

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. [REDACTED] 12

SEYMOUR LEE NIMMER, by his legal representatives
and guardian, Cecile V. Nemy,
Petitioner,

vs.

MARTIN E. EBY CONSTRUCTION CO., INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

✓ ANTHONY F. ZIMMER
595 Capital Life Center
Denver, Colorado 80202

JOSEPH E. MCGOWAN
745 Washington Building
Washington (5) D.C.

JOHN G. MOORE
1035 American Nat'l Bank Bldg.
Denver, Colorado 80202

Attorneys for Respondent

INDEX

	PAGE
I. Opinions Below	1
II. Jurisdiction	1
III. Question Presented	2
IV. Constitutional Provisions, Federal Statutes and Federal Rules Involved	2
V. Statement	3
VI. Summary of Argument	4
VII. Argument	5
VIII. Conclusion	9

CITATIONS

CASES:

Galloway v. United States, 319 U.S. 372.....	8
--	---

STATUTES:

Act of June 23, 1948, 62 Stat. 963, 28 U.S.C. 2106	2
--	---



IN THE
**SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1965

No. 383

SANDRA LEE NEELY, by her legal representative
and guardian, Cecile V. Neely,
Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION Co., Inc.,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

BRIEF OF RESPONDENT IN OPPOSITION

I. OPINIONS BELOW

Neither the judgment of the District Court nor the opinion of the Court of Appeals for the Tenth Circuit (App. to Petition) are as yet reported.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III. QUESTION PRESENTED

Whether the statutory power of the Court of Appeals to reverse and set aside judgments brought before it for review is limited by the provisions of Rules 50 (d) and 38 (a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States, so as to prevent the Court of Appeals here from reversing the jury verdict and judgment of the District Court and remanding the case to said court with instructions to dismiss the action.

IV. CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND FEDERAL RULES INVOLVED

The pertinent provisions of Rules 38 (a) and 50 (d) Federal Rules of Civil Procedure as well as the pertinent provisions of the Seventh Amendment to the United States Constitution are set forth in the Petition at pp. 2 and 3.

The pertinent portions of the Judicial Code of 1948 (62 Stat. 963, 28 U.S.C. 2106) provide as follows:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

V. STATEMENT

The action below was brought by petitioner to recover damages for the alleged wrongful death of her father in an accident which took place inside a missile silo being constructed in the State of Colorado. Petitioner alleged that the death of her father was proximately caused by the negligence of respondent in the erection, maintenance and supervision of a certain platform located in said silo and from which her father fell to his death. Respondent made appropriate motions in the trial court for directed verdict at the close of petitioner's evidence and again at the close of all the evidence, alleging in substance that there was no evidence of negligence on its part and that petitioner had failed to establish that any act or omission on the part of respondent proximately caused the accident in question. Both motions were denied. A Federal jury awarded petitioner damages in the sum of \$25,000.00.

Respondent then filed a Motion for Judgment Notwithstanding the Verdict or in the alternative for a New Trial. Both motions were denied and judgment was entered on the jury's verdict.

Respondent then appealed to the Court of Appeals, which court reversed the action and remanded the same to the trial court with instructions to dismiss the same. Basis for the ruling by the Court of Appeals was that the record wholly failed as a matter of law to establish either evidence of negligence on the part of respondent or the proximate cause of the death of petitioner's father. The trial court complied with the mandate of the Court of Appeals.

Petitioner did not, as appellee in the Court of Appeals, assert any grounds entitling her to a new trial in

the event said court concluded that the trial court erred in denying respondent's Motion for Judgment Notwithstanding the Verdict.

Petitioner did not, at any time subsequent to the entry of judgment by the Court of Appeals, request said court on Petition for Rehearing or otherwise, to modify its judgment in any respect.

The only relief requested or prayed for by petitioner in her brief in the Court of Appeals was that the judgment of the trial court be affirmed. No request whatsoever was therein made relative to the possible granting of a new trial. (Page 16 of Brief of Appellee.)

VI. SUMMARY OF ARGUMENT

The issue in the present case is extremely narrow, and petitioner's cryptic and entirely unsupported attempt to read into the provisions of Rule 50(d) something which is not there in no way warrants review by this Court on Certiorari.

The Court of Appeals unquestionably has the statutory power to review judgments of the District Court lawfully brought before it, to reverse and set aside such judgments, and on remand to direct the District Court to enter such judgments as the Court of Appeals may direct. If this were not so, the Court of Appeals would not be an appellate court at all.

Rule 50(d) neither limits nor restricts the appellate powers of the Court of Appeals. It contains no words of prohibition or restriction whatsoever insofar as the powers

of the Court of Appeals are concerned. The only words in Rule 50(d) which in any way refer to the Court of Appeals enlarge rather than restrict the powers of said court. The remaining words in Rule 50(d) confer certain rights upon an appellee in the Court of Appeals, which rights the petitioner here made no attempt to exercise.

At no stage of the proceedings below did petitioner seek to avail herself of the provisions of Rule 50(d); nor did petitioner at any time request the Court of Appeals to make any rulings whatsoever with regard to a new trial as provided for in said rule. Having failed to do so, petitioner has no basis to complain of the action of the Court of Appeals for the first time here.

The action of the Court of Appeals in ordering dismissal of the case in no way deprives petitioner of her constitutional right to a trial by jury.

VII. ARGUMENT

A. *The Decision Below is Clearly Correct.* After a detailed analysis of the evidence produced by petitioner in the trial court, the Court of Appeals, after first conceding that proximate cause is ordinarily a question of fact for the jury, ruled *as a matter of law* that petitioner had failed to establish a causal connection between any proven act or omission on the part of respondent and the death of petitioner's decedent; that the trial court should have granted respondent's timely Motion for Judgment Notwithstanding the Verdict; and the action should be dismissed. The soundness of this ruling is amply borne out by the record, and more especially since, as the Court of Appeals pointed out (Page v. of Appendix to Petition)

the evidence was without dispute, and established nothing more than that petitioner's decedent was on a platform constructed by respondent at the time he fell, there being no evidence as to the cause of the fall.

B. *There is No Conflict of Decision.* Since petitioner concedes (Page 4 of the Petition) that to her attorney's knowledge, Rule 50(d) has not been interpreted by any court, she has no standing to seek review here on the basis of conflict of decision.

C. *Rule 50(d) Does Not Limit the Appellate Powers of the Court of Appeals.* The only point which petitioner attempts to make is that the provisions of Rule 50(d) prevent the Court of Appeals — or for that matter any court of appellate jurisdiction, from reversing a judgment of a lower court and directing said lower court to dismiss the action. In other words, what petitioner is saying is that the Court of Appeals had only three alternatives: (1) to affirm the judgment of the trial court; (2) to order the trial court to grant a new trial; or (3) to order the trial court to itself determine whether a new trial should be granted.

In the first place, Rule 50(d) contains no such language. It contains not one word of limitation insofar as the power of the Court of Appeals is concerned. The only language contained in Rule 50(d) which even mentions the appellate court is the following: (Page 2 of the Petition)

“... If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from

directing the trial court to determine whether a new trial shall be granted."

By no stretch of the imagination can these words be construed as words of limitation. They do not prohibit the appellate court from doing anything. They are permissive only. They permit the appellate court to order the granting of a new trial, and they permit the appellate court to leave the granting of a new trial up to the trial court. But they do not prevent or prohibit the appellate court from doing anything it was by statute empowered to do!

As set forth in the Judicial Code (Part IV supra), the appellate courts of the United States — of which the Court of Appeals is unquestionably one — have the statutory power to reverse judgments properly brought before them, to remand such judgments and to direct the entry of other judgments. If an appellate court did not have this power, it would not be an appellate court. Petitioner's statement that all the Court of Appeals could do here was either affirm, grant a new trial itself, or order the trial court to pass on the necessity of a new trial is absolutely contrary to the statute, and has no basis whatsoever.

Petitioner's brief is devoid of any citation of authority — case or otherwise — supporting her contention here that the powers of the Court of Appeals to reverse, remand and dismiss are in any limited by Rule 50(d). We have found no such authority, and we submit that no such authority exists.

D. Petitioner Failed to Request the Relief to Which Rule 50(d) Entitled Her. As we have already established, Rule 50(d) extends certain rights to litigants; it does not restrict the powers of the appellate courts. As appears

from the record in this case, petitioner at no time in either court below sought any order to the effect that if judgment notwithstanding the verdict were granted by the trial court or ordered by the Court of Appeals on appeal, she be granted a new trial. This was her right under Rule 50(d), and she utterly failed to exercise — or even attempt to exercise said right. Having failed to ask either court for any such relief, she cannot seek certiorari here for said courts' failure to grant any such non-requested relief. In her brief before the Court of Appeals, petitioner sought only one thing — affirmance of the judgment of the District Court. Her very words to that effect were:

“... There being no reversible error present, the appellee prays *that the judgment be affirmed* and that there be granted to the appellee such other and further relief as to the court may seem appropriate.”
(Page 16 of Brief of Appellee). (Emphasis added)

E. Petitioner's Right to Jury Trial Has Not Been Denied. Petitioner infers in her petition that in reversing the judgment entered on the jury verdict, the Court of Appeals acted contrary to the Seventh Amendment to the United States Constitution. No cases are cited in support of such assumption, and the great weight of authority clearly holds that neither directed verdicts in trial courts nor reversals and dismissals on appeal nor granting of judgments notwithstanding the verdict deprive any litigant of any rights under the said Amendment. One of the many decisions which so hold is *Galloway v. United States*, 319 U.S. 372, where this Court stated as follows: (Page 389)

“If the intention is to claim generally that the Amendment deprives the federal courts of power to direct

a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. (Citing cases)."

F. *There is no Important Question of Federal Law.*
Reduced to its simplest terms, petitioner asks this Court to grant certiorari for no other reason than to construe the provisions of Rule 50(d) (P. 5 of Petition). The provisions of the rule are clear and understandable, and have not been the subject of any judicial dispute since their adoption in 1963. Petitioner's inability to understand such simple provisions does not convert a correct decision into an important question of Federal law. Furthermore, Rule 50(d) was not involved in this case and has nothing to do with this case.

VIII. CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANTHONY F. ZARLENGO
595 Capitol Life Center
Denver, Colorado 80203

JOSEPH S. MCCARTHY
745 Washington Building
Washington (5) D.C.

JOHN C. MOTT
1020 American Nat'l Bank Bldg.
Denver, Colorado 80202

Attorneys for Respondent